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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 825

DAVE FLEISCHER, Individually and as Trustee in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION and FLAMINGO FILMS, INC.,

Defendants-Respondents,

and

A. A. P. INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. T. V. CORP., WPIX, INC., DUMONT BROADCASTING CORPORATION, KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Defendants,

and

ROBERT S. BENJAMIN and ARTHUR B. KRIM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BENJAMIN AND KRIM IN OPPOSITION.

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WILLIAM B. MALLIN,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BENJAMIN AND KRIM IN OPPOSITION.

The "Questions Presented" by Petitioner.

Petitioner seeks certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which dismissed an appeal from an order of the United

States District Court for the Southern District of New York (Palmieri, J.). Judge Palmieri's order denied a motion by Petitioner for a temporary and permanent injunction to restrain an already consummated $8,400,000 stock transaction (20a-23a,* 146). Questions 1, 5 and 6 apparently relate to that order.

In the same opinion in which the Court of Appeals dismissed the appeal from Judge Palmieri's order, it dismissed an appeal from a separate and distinct order made by Judge Herlands, which arose out of the same litigation. Questions 2, 3 and 4 apparently relate to that order.

This brief, on behalf of respondents Benjamin and Krim (who are not parties to the action below), is submitted in opposition to so much of the petition as seeks review of Judge Palmieri's order, i.e., questions 1, 5 and 6. The remaining questions are discussed in the brief submitted by Louis Nizer, Esq.

Lurking in the background of this case is the question of whether Judge Palmieri's order was appealable. But since the Court of Appeals said that his decision was correct on the merits, the question of appealability is of academic interest only.

Statement.

Petitioner brought an action in the Southern District Court of New York against Paramount Pictures, Inc., Associated Artists Productions, Inc. (hereinafter "AAP"), and others. Although it is difficult to glean from the amended complaint (which is not part of the record) exactly

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* Unless otherwise indicated, references are to pages in the appendices submitted on the appeal from Judge Palmieri's order to the Court of Appeals, which are part of the record in this Court; numbers followed by the letter "a" refer to appellant's appendix (blue); numbers followed by the letter "b" refer to appellees' appendix (white).

what this action purports to be about, it is apparently essentially an action for alleged breach of contract between a dissolved corporation in which Petitioner was a stockholder and one of the Paramount defendants (7b-10b, 31b-33b). Part of the subject matter of that contract was 119 Popeye cartoons (14b, 19b, 20b).

This action (hereinafter "the main action") is still pending in the pleading stage in the District Court. Neither the appeal to the Court of Appeals nor the instant petition for certiorari involves the merits of the main action.

On December 17, 1957, while the main action was pending, Gotham Television Film Corporation (hereinafter "Gotham") (not a party to the main action) and a subsidiary of United Artists Corporation (not a party to the main action) purchased from twelve individuals (not parties to the main action) 700,000 shares of AAP stock, which was approximately 41% of the outstanding stock of AAP (20a-21a). Negotiations for the purchase of AAP stock by United Artists were actually begun in August, 1957, prior to the time the main action was commenced (20a).

Thereafter Petitioner made a motion in the main action which in form demanded an injunction against this consummated purchase and sale of AAP stock. In order to show some relationship between the main action, the stock transaction and the 119 Popeye cartoons, Petitioner pointed to the following combination of circumstances:

(a) Paramount Pictures, Inc., Paramount Pictures Corporation and Flamingo Films, Inc. are defendants in the main action.

(b) They are represented by the firm of Phillips, Nizer, Benjamin, Krim & Ballon (21a).

(c) Robert S. Benjamin and Arthur B. Krim are partners in the Phillips, Nizer firm (21a).

(d) Messrs. Benjamin, Krim and another partner, Seymour M. Peyser, together own approximately 30% of the stock of United Artists which has about 3,000 shareholders (14b).

(e) Gotham, the purchaser of the AAP stock, is a subsidiary of United Artists (20a, 14b).

(g) The stock which Gotham has purchased from twelve of the stockholders of AAP represents approximately 41% of the stock in that corporation (20a).

(h) AAP owns, among many other things, the 119 Popeye cartoons (14b), in which, in this action, Petitioner claims he has some sort of an interest.

On this basis Petitioner asserted that the proposed transaction constituted a violation of Canon 10 of the Canons of Professional Ethics, which provides:

> "10. Acquiring Interest in Litigation.
>
> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." DRINKER, LEGAL ETHICS, p. 312 (1953).

Judge Palmieri's Order.

In the order denying Petitioner's motion, Judge Palmieri made, *inter alia*, the following findings of fact:

> 1. "Neither Robert S. Benjamin [nor] Arthur B. Krim . . . has acquired any stock interest in A. A. P. . . ." (21a);
>
> 2. "The A. A. P. stock acquired by Gotham is not part of the subject matter of the instant lawsuit." (21a);
>
> 3. "Plaintiff has made no sufficient showing . . . that he is aggrieved by any such alleged violation . . .

or even that he has in any way been affected or prejudiced by Gotham's acquisition from twelve stockholders of A. A. P. of their minority stock interest in A. A. P." (21a, 22a); and

4. "Plaintiff has made no sufficient showing of any irreparable injury to plaintiff . . ." (22a).

On these facts, Judge Palmieri concluded that Canon 10 had not been violated and that in any event, Petitioner had no standing to attack the transaction.

From this order Petitioner appealed to the Court of Appeals for the Second Circuit.

Decision of the Court of Appeals.

The Court of Appeals dismissed this interlocutory appeal (Pet. pp. 37-42). The majority opinion of Chief Judge Clark, concurred in by District Judge Gibson, held:

1. The basic thrust of the motion before Judge Palmieri was to exclude attorneys from the main action, with the prayer to restrain the stock transaction being merely incidental (Pet. pp. 38-39); and

2. So viewed, Judge Palmieri's order does not fall into the class of collaterally final orders made appealable by *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (Pet. pp. 39-41).

Circuit Judge Moore dissented from the majority's holding that the order was not appealable, and voted to affirm on the ground that Judge Palmieri's order was correct (Pet. pp. 43-45).

Judges Clark and Gibson likewise said that Judge Palmieri was correct on the merits (Pet. p. 42), so that all three judges, regardless of the question of appealability, found the orders appealed from correct on the merits.

Reasons for Denying the Writ.

Petitioner asks this Court to review an order, now moot, rejecting on the basis of comprehensive findings of fact his frivolous challenge to a stock transaction which he has no standing to attack in the first place. To grant this review, this Court would have to ignore its settled practice of refusing to review evidence to pass upon the correctness of findings of fact, and to undertake this task on the basis of an unintelligible record, composed chiefly of incompetent evidence.

Moreover, none of the accepted grounds for granting certiorari is present here. Regardless of appealability, both courts below have unanimously found no merit in Petitioner's contentions on the merits. The decision below does not conflict with any decision of another circuit or of this Court, nor does it raise a single issue of importance. In short, Petitioner would have this Court expend its limited time in resolving insignificant questions, contrived out of thin air, to accomplish no purpose except perhaps to satisfy Petitioner's curiosity.

I.

Questions 5 and 6 propounded by Petitioner are not raised or supported by the record.

Judge Palmieri found that Messrs. Benjamin and Krim purchased no AAP stock, that the AAP stock purchased by Gotham is not the subject matter of the main action and that Petitioner has no standing to attack this stock transaction because he is not affected thereby.

It follows that questions 5 and 6 are simply not raised or supported by this record. Both questions assume that

such a purchase by Messrs. Benjamin and Krim occurred, and Judge Palmieri found the opposite. Moreover, these questions ask this Court, in the guise of presenting a question of law, to review the findings of fact of two courts below that Petitioner is not injured by the stock transaction and therefore has no standing to raise the questions. Finally, the questions call for a determination whether the AAP stock purchased by Gotham is "the subject matter of this action" within the meaning of Canon 10. Since Petitioner has not deigned to include in his record his complaint or amended complaint, it is difficult to see how that question could be resolved.

II.

Petitioner has no standing in this Court.

The record is clear that Petitioner claims no interest in the AAP stock as such. It is not the subject matter of the main action; the twelve AAP shareholders, Gotham, and United Artists are not parties to the main action. So far as Petitioner is concerned, it is totally irrelevant who owns this stock. Indeed, in the three courts before which this case has come, Petitioner has as yet made no suggestion whatsoever as to how the disposition of this stock has harmed him, or how it could possibly harm him.

As a result, in the District Court, Judge Palmieri correctly found that:

> "Plaintiff has made no sufficient showing • • • that he is aggrieved by any such alleged violation • • • that he has any standing to seek, individually, enforcement of Canon 10 of the Canons of Professional Ethics • • • or even that he has in any way been affected or prejudiced by Gotham's acquisition

> from twelve stockholders of A. A. P. of their minority stock interest in A. A. P." (21a-22a).

And Chief Judge Clark in the majority opinion for the Court of Appeals said:

> "Indeed, the motion before Judge Palmieri involves no claim or right by plaintiff. The allegedly champertous transactions made the basis of that application caused no direct injury to plaintiff; plaintiff's status on that motion seems to be comparable to that of any citizen or officer of the court calling to the attention of the court a possible instance of misconduct occurring before it" (Pet. pp. 39-40).

The law is clear in these circumstances that this Court will not pass upon the questions presented, since its decision will have no effect on the complaining party. E.g., *Tileston* v. *Ullman*, 318 U. S. 44 (1943); *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U. S. 429 (1952). The manifest applicability of this principle to the case at bar requires the denial of certiorari.

III.

The order which Petitioner seeks to review on certiorari is moot.

The status of the 700,000 shares of AAP stock, involved in the transaction here claimed to have violated Canon 10, has radically changed since Judge Palmieri's order.

On October 17, 1958, pursuant to agreement of August 8, 1958, as amended September 15, 1958, Gotham transferred title to this stock to United Artists Associates, Inc. (hereinafter "UAA"). On October 17, 1958 UAA in turn transferred 2,000,000 shares of AAP stock, including the

700,000 shares here involved, to AAP in exchange for the bulk of AAP's assets. (Affidavit of Edward N. Costikyan, sworn to March 25, 1959, p. 5 which was submitted in this Court on Petitioner's motion for a stay.)

Finally, on October 31, 1958, AAP filed a Certificate of Reduction of Capital retiring the entire 2,000,000 AAP shares. *Ibid.* As a result, the AAP stock involved in the transaction here complained of no longer exists.

It follows that Petitioner is asking this Court to pass upon facts that have no real meaning and on which a decision could have no effect. A review of Judge Palmieri's order accordingly presents only moot and abstract issues. And it is beyond the jurisdiction of this Court, as limited by Article III of the Constitution, to pass upon such issues. E. g., *Doremus* v. *Board of Education of the Borough of Hawthorne, supra; Muskrat* v. *United States*, 219 U. S. 346 (1911).

IV.

The "questions presented" by Petitioner would require a review of the evidence to pass upon the correctness of findings of fact concurred in by both courts below, an inappropriate task for this Court.

Judge Palmieri made detailed and comprehensive findings of fact, conclusive upon all aspects of the Canon 10 question, and they are also basic to the questions of Petitioner's standing in this Court and the appealability of Judge Palmieri's order in the Court of Appeals. As long as these findings stand, this order must also stand; as a result, any review of this case must pass upon these findings.

But this Court will not grant certiorari in order to review the correctness of findings of fact or "to review

the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1937). This is especially so, where, as here, both courts below have in effect concurred in these findings. *Ibid; Faulkner* v. *Gibbs*, 338 U. S. 267 (1949).

V.

Petitioner has failed to make a record sufficiently complete and intelligible for review by this Court.

Any review of the issues arising out of Judge Palmieri's order would require this Court to examine in detail (1) the nature and form of the stock transaction complained of; (2) the relationship of the stock transaction to the main action; and (3) the relationship of the order to the main action.

Yet Petitioner has not printed the amended complaint which defines the main action. Nor has he printed the instruments passing the title of the AAP stock to Gotham. Instead, Petitioner endeavors to show the details of this complex stock transaction, as well as the contents of the amended complaint, by means of affidavits, largely based on hearsay. A review on this record, especially a review of findings of fact, would be wasteful and unsatisfactory. The absence of an adequate or even an intelligible record is compelling reason for this Court to deny certiorari.

VI.

The petition presents no conflicts between circuits; the overruling of the *Harmar* case does not create the type of "conflict" among lower courts calling for certiorari.

Petitioner does not suggest that there is a conflict between the decision in the case at bar and a decision of another circuit. See Supreme Court Rule 19.

But he does assert that there exists an "intramural controversy among the judges of the United States Court of Appeals, Second Circuit" (Pet., p. 20), based upon the fact that the Court of Appeals in the case at bar overruled *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 255 (2d Cir. 1956), *cert. denied* 355 U. S. 824 (1957), also decided in the Second Circuit.

But the overruling of the *Harmar* case does not create the type of conflict which should be settled by this Court, for "conflict or inconsistency between decisions of the same Court of Appeals ordinarily is not a ground for the issuance of certiorari since the later in point of time is controlling." ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §336, p. 668 (2d ed. Wolfson & Kurland 1951); Supreme Court Rule 19. In short, there is no conflict to be settled by this Court. Thus, this Court's special and significant role of insuring uniformity of Federal law throughout the country is not a factor in the instant case. The relationship of this case to the *Harmar* case, accordingly, provides no ground for certiorari.

VII.

The decision below does not conflict with any decision of this Court.

The ruling of the Court of Appeals dismissing the appeal from Judge Palmieri's order does not conflict with this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). While that case held appealable an interlocutory order refusing to require the plaintiff to post security for costs, this Court made clear that the so-called doctrine of collateral finality operates within narrow confines. It said:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.
>
> . . . . . .
>
> "But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." 337 U. S. 546, 547.

None of the conditions specified by this Court have been met here.

The order here is not final. The order is related to the main action; for, since it involves an alleged purchase of an interest in the main action, it is necessary to determine

what the main action involves. What the main action involves cannot be determined without the amended complaint, which Petitioner has failed to print.

Moreover, there is nothing substantial about the Canon 10 question; Petitioner's assertion of professional misconduct is frivolous. And, as found by Judge Palmieri and held by the Court of Appeals, Petitioner asserts no claim of right here; he merely acts like any member of the public who might point out alleged misconduct to the Court.

VIII.

The petition raises no important questions.

There is, in the first place, no important public interest attached to the outcome of this particular case; as a result, the case at bar in and of itself is not significant from the standpoint of Supreme Court review.

The question of appealability—especially the appealability of an order which both Courts below agreed was correct on the merits—has no general importance or general applicability. For, whether this particular order denied an injunction or refused to disqualify attorneys, and whether it has collateral finality turns on the particular, unique facts of the transaction complained of in relation to the almost incomprehensible main action. This Court has clearly indicated that it will not grant certiorari to consider the specific facts of a case. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938); *NLRB* v. *Waterman*, 309 U. S. 206, 208 (1939). Hence, this narrow issue does not warrant the attention of this Court.

Further, the past practice of this Court makes it clear that the question of appealability is not important enough

to merit granting certiorari, absent a conflict of the type calling for review. For example, the *Cohen* case, which came to this Court by certiorari, is the leading case on the doctrine of collateral finality. Yet when this same issue of appealability was first presented to this Court in a petition for certiorari in *Donovan* v. *Queensboro Corporation*, 335 U. S. 804 (1948), certiorari was denied. The only difference between the *Cohen* and *Donovan* cases, so far as certiorari is concerned, was that at the time of the petition in the *Cohen* case a conflict had occurred between the decisions of the Second Circuit in *Donovan* and the Third Circuit in *Cohen*. See ROBERTSON & KIRKHAM, JURISDICTION OF SUPREME COURT, §322, p. 631. (Wolfson & Kurland 1951) Moreover, in *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 255 (2d Cir. 1956); *cert. denied* 355 U. S. 824 (1957), where one of the issues was the appealability of an order refusing to disqualify attorneys, this Court denied certiorari.

We submit that the *Cohen*, *Donovan* and *Harmar* cases demonstrate that the issue of appealability of an interlocutory order is not important enough to warrant certiorari, absent a conflict between circuits or with this Court.

Finally, the question of the alleged violation of Canon 10 is not an issue of general importance or general applicability. Both the issues of whether Messrs. Benjamin and Krim purchased the AAP stock in question and whether such stock represents a speculation in litigation relate solely to the particular, unique facts of the case at bar.

Moreover, the American Bar Association opinions already construing Canon 10, e.g., Nos. 176, 246 and 279, as well as the face of Canon 10, make it clear that the assertion of professional misconduct here is frivolous; accordingly, it cannot present a significant question.

Conclusion.

The petition for a writ of certiorari to review Judge Palmieri's order should be denied.

Respectfully submitted,

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EDWARD N. COSTIKYAN,
WILLIAM B. MALLIN,
Of Counsel.

Dated: New York, N. Y.
May 6, 1959